addition, the Commission would have to conduct a full analysis of LEC and IXC networks and rate adjustments on all networks that could cause traffic to shift.

As the Notice acknowledges, moreover, peak periods may change over time.[32/] As wireless competition increases over time, therefore, peak demand and peak hour periods will change. The Commission would, therefore, have to engage in numerous, time-consuming rulemakings on an ongoing basis just to recalculate peak demand and peak hour periods to keep pace with rapid increases in wireless competition.

Accordingly, deploying a usage-based peak-load pricing scheme for LEC-to-CMRS interconnection will delay unduly competitive delivery of wireless services to customers. Peak-load pricing mechanisms would create more definitional, implementation and accounting problems for LEC-to-CMRS interconnection than it would solve. Rather, the Commission should remain focused on its tentative conclusion that interim application of bill-and-keep to all LEC-to-CMRS interconnection provides an administratively and economically efficient pricing mechanism that also closely approximates the operation of free market forces.[33/]

#### c. Experience at the State Level Confirms That Bill-and-Keep Is the Optimal Compensation Mechanism To Use on an Interim Basis.

As recognized by the Commission, a number of state public utility commissions have started to address the issues of reciprocal compensation between competing providers

32/ Notice, at ¶ 45.

33/ *See* Dr. Gerald W. Brock, *Price Structure Issues in Interconnection Fees*, prepared on behalf of Teleport Communications Group (March 30, 1995).

of telephone service. *Notice* at ¶ 60. The experience of these state commissions in the context of landline interconnection provides ample evidence that bill-and-keep is the compensation mechanism that best serves the public interest. Recent decisions in Oregon and Washington succinctly state the benefits of bill-and-keep as an interim compensation mechanism:

> The primary advantage of mutual traffic exchange as a compensation structure is that, in the near term, it provides a simple and reasonable way for two competing companies to interconnect and terminate each other's calls.[34/]

---

> The inherent simplicity of bill-and-keep makes it a sensible choice as a transitional compensation mechanism until a more comprehensive interconnection rate structure can be implemented.[35/]

These state commissions have recognized that an important virtue of bill-and-keep is that it can be implemented immediately, without engaging in lengthy negotiations, tariff review or cost studies. Not only does this permit potential LEC competitors to begin quickly providing service to customers, it enables regulators to focus their efforts on myriad other important issues which must be resolved before a permanent interconnection rate structure is adopted. As the Oregon PUC stated:

> Our decision to adopt bill-and-keep on an interim basis will allow the applicants to enter the local exchange market while the Commission concludes a number of important dockets that will have a major impact on interconnection rates paid by telecommunications providers.[36/]

---

34/ *Washington UTC Order*, at 29.

35/ *Oregon PUC Order*, at 53.

36/ *Oregon PUC Order*, at 53. In addition, the Oregon PUC, like many others, recognized that bill-and-keep can be implemented quickly because it is the predominant

A further advantage of bill-and-keep that has been recognized by the states is its administrative simplicity. For example, the Oregon PUC relied on the fact that bill-and-keep eliminates the costs of monitoring traffic to determine a carrier's minutes of use and in most cases eliminates the need for money to change hands between competing telephone companies:

> Interim bill-and-keep arrangements will also avoid transactions costs associated with cash based compensation methods because interconnecting carriers will not incur the expense of measuring, collecting and auditing traffic. This is advantageous during the initial stages of competition, because measurement costs impose a greater relative burden on new entrants, who must spread the capital cost of such systems over much smaller volumes of traffic.[37/]

In sum, numerous states have recognized that bill-and-keep is far superior to a compensation methodology based on access charges and have rejected LEC attempts to recover substantial "contributions" from their interconnector-competitors. Accordingly, for all the reasons relied on by these states, the Commission should require the use of bill-and-keep as an interim compensation approach for LEC-CMRS interconnection.

#### d. Symmetry in Compensation Arrangements Between LECs and CMRS Providers Is Essential To Deter Anticompetitive Practices by Incumbent LECs.

The Notice tentatively concludes that LEC-to-CMRS interconnection rates should be symmetrical — that is, LECs should pay CMRS providers the same zero-based rates as CMRS providers pay LECs.[38/] Comcast urges the Commission to adopt this tentative

---

compensation mechanism between neighboring LECs. *Id.; Washington UTC Order*, at 29.

37/ *Oregon PUC Order*, at 53-54.

38/ *See* Notice, at ¶ 38.

conclusion. Symmetry of interconnection arrangements is necessary in a co-carrier relationship such as that which exists between LECs and CMRS providers because both carriers bring the particular benefits of their network facilities and functions to the interconnection. Federal and state regulators, as well as free market conduct in the Internet context, recognize the benefit of symmetrical bill-and-keep interconnection arrangements as a means of expanding network efficiencies.

By contrast, disparity in existing LEC-to-CMRS interconnection arrangements favors LECs and leads to anticompetitive results. Absent a symmetrical interconnection requirement, an uneconomically high interconnection rate charged by an ILEC would have a disparate impact on non-affiliated CMRS providers. The interconnection payments presumably compensate the ILEC for any losses sustained by its affiliated CMRS providers due to the uneconomically high interconnection rate. The non-affiliated CMRS provider, however, would incur a non-recoverable loss in paying the uneconomically high interconnection rate to the ILEC.[39/]

Symmetry in LEC-to-CMRS interconnection arrangements would prevent this disparity between ILECs and CMRS providers. By requiring that each party to the interconnection arrangement compensate one another for their respective network costs,

---

39/ If BellSouth's proposal to eliminate the BOC-cellular structural separation rule is adopted, moreover, this discrimination problem will only become worse. *See* Letter from Werner K. Hartenberger, Attorney for AirTouch Communications, Inc., Comcast Corporation and Cox Enterprises, Inc., to William E. Kennard, General Counsel, Federal Communications Commission, *regarding Bell South Corporation v. FCC*, Case Nos. 94-4113, 95-3315, *consolidated with Cincinnati Bell Tel. Co. v. FCC*, Case Nos. 94-3701/4113, 95-3023, 3238, 3315 (6th Cir. Nov. 9 1995), filed on January 18, 1996.

symmetry will enable CMRS providers to recover their network costs while preventing ILECs from recovering a windfall in excess of their network costs.

Requiring symmetry in LEC-to-CMRS interconnection arrangements is consistent with the interconnection provisions of the TCA that apply between LECs and landline telecommunications carriers. The TCA imposes a duty upon all LECs to establish symmetrical interconnection arrangements. In particular, Section 251(b)(5) requires all LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications. In addition, Section 251(c)(2) imposes a duty upon all LECs to:

> . . . provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access . . . at any technically feasible point within the carrier's network . . . that is *at least equal in quality* to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and . . . *on rates, terms and conditions that are just, reasonable, and nondiscriminatory* . . . .[40/]

State regulators also have implemented symmetrical bill-and-keep requirements for interconnection between ILECs and their competitors.[41/]

Contrary to ILEC claims that they will forgo "revenue requirement" in interconnecting with CMRS providers on a symmetrical, bill-and-keep basis, CMRS providers will bring the benefits of their advanced wireless facilities and services to the

---

40/ *See* 47 U.S.C. § 252, TCA, § 101.

41/ *See Washington UTC Order*, at 29; *Oregon PUC Order*, at 53-4.

arrangement to the benefit of ILECs and their landline customers.[42] Internet service providers ("ISPs"), for example, have long recognized the benefit of symmetrical "peering" interconnection arrangements using bill-and-keep interconnection.[43] The key to distinguishing an Internet service provider's "peer" from an end user is "[the] perceived equality in the peering relationship . . . [and] the use of peering criteria (such as specification of ISP network infrastructure, or network level of service and coverage areas as eligibility for peering."[44] Similarly, CMRS providers are entitled to "peer" with LECs on a bill-and-keep interconnection basis because they will make available quality network infrastructure — such as wireless switching, microcell and picocell spectrum management, and advanced roaming, as well as state-of-the-art wireless signaling and routing network information — by means of symmetrical LEC-to-CMRS interconnection arrangements.

---

42/ Symmetrical arrangements under bill-and-keep pricing, moreover, closely approximate free market forces, where facilities-based service providers bring mutually offsetting benefits to an interconnection arrangement.

43/ Internet network operators and service providers employ a bill-and-keep model and do not charge one another for interconnecting their networks. Network operators and service providers are distinguished from end users by means of "peering groups." *See* Richard Simnett, Thomas R. Spacek, Padmanabhan Srinagesh, *An Economic Analysis of the Claimed Applicability of Bill-and-Keep Interconnection Arrangement to Local Telecommunications Competition*, at 12-14 (Bellcore, 1995) ("Bellcore"); *see also* Dr. Gerald W. Brock, *Price Structure Issues in Interconnection Fees*, prepared on behalf of Teleport Communications Group (March 30, 1995). Internet peering groups evolved out of the public sector NSFnet's backbone network, which would allow interconnection only on an "acceptable use" basis. The two leading commercial peering groups are Commercial Internet Exchange ("CIX") and Metropolitan Area Ethernet - East ("MAE-East"). Bellcore, at Appendix.

44/ *See* Geoff Huston, *Internet Service Provider Peering*, Working Paper, Internet Engineering and Planning Group, at 5 ("IEPG") (December 1994).

Unfortunately, as the Notice acknowledges, ILECs as a general matter currently do not compensate CMRS providers for LEC-originated traffic terminating on the wireless network, and even charge CMRS providers in some cases for such termination.[45/] Curtailing such anticompetitive behavior requires more than simply making the Section 208 complaint process available. The Commission should conduct periodic audits or market studies of incumbent LEC practices with respect to interconnection provided to wireless carriers.[46/]

Accordingly, adoption of a symmetrical interconnection requirement, coupled with a bill-and-keep model with a zero-based rate, will enable CMRS providers and LECs to reap the marketplace benefits of competitive co-carrier interconnection. Absent a symmetrical interconnection requirement, ILECs will continue to engage in anticompetitive practices such as not compensating CMRS providers for terminating ILEC-originated traffic. Such a result will hinder the development of an advanced wireless and wireline public switched

---

45/ *See* Notice, at ¶ 81.

46/ *See Common Carrier Bureau Seeks Comment on Telecommunications Access Provider Survey*, Public Notice, DA 95-2287 (released November 3, 1995) ("Data Collection"); *Economic Implications and Interrelationships Arising From Policies and Practices relating to Customer Interconnection, Jurisdictional Separations and Rate Structures*, Notice of Inquiry, Docket No. 20003, 46 F.C.C.2d 214, (1974), Supplemental Notice, 50 F.C.C.2d 574 (1974), First Report, 61 F.C.C.2d 766 (1976) ("*Customer Interconnection*"), Second Report and Order, 75 F.C.C.2d 506 (1980) ("*Customer Interconnection II*").

telephone network with full interconnectivity,[47/] to the detriment of the customers and the wireless industry.

### e. The Commission Should Allow for Bill-and-Keep At the Tandem or End Office Where a CMRS Provider Interconnects on the LEC's Network.

The Notice's tentative conclusion that bill-and-keep should apply for terminating calls at the LEC's end office only is too narrowly framed.[48/] CMRS providers should be able to obtain bill-and-keep at any point of interconnection to the LEC network, whether it be at an end office or a tandem switch. If bill-and-keep is provided only at the end office, then LECs will be able to impose discriminatory interconnection rates upon those CMRS providers who choose to interconnect at the tandem, even if tandem interconnection is a more efficient form of interconnection for both networks. The TCA and state regulations by and large do not distinguish between points of interconnection for purposes of defining the applicability of bill-and-keep model, and neither should this Commission.

---

47/ Section 256 of the TCA requires, for example, that the Commission:

> promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to the public telecommunications networks used to provide telecommunications service . . . . to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks.

47 U.S.C. § 256(a), TCA, § 101.

48/ *See* Notice, at ¶ 62.

Several states require that bill-and-keep be provided at any mutually agreeable point between the ILEC and competitive LECs. The California PUC, for example, requires that ILECs provide bill-and-keep at any "mutually agreeable point of interconnection."[49/] The California PUC explained that:

> The environment most conducive to a level playing field is one in which parties have flexibility to negotiate terms and conditions for interconnection which are best suited to their specific needs. Accordingly, we will not require any fixed number of [points of interconnection] that a [competitive local exchange carrier] or LEC must have or dictate where the POIs must be located.[50/]

The Washington UTC also ordered bill-and-keep at "meet points" to be negotiated in good faith by LECs and interconnecting parties. In requiring meet-point interconnection, the Washington UTC observed that "[i]nterconnection rules should not force one company to adopt the architecture of another or to incur costs over and beyond what is necessary to interconnect with a competitor."[51/] These state decisions evidence the social benefit to be gained from requiring bill-and-keep at any interconnection point mutually agreed upon by the parties.

Moreover, the TCA imposes a duty upon all LECs "to establish reciprocal compensation arrangements for the *transport and termination* of telecommunications."[52/]

---

49/ *See Order Instituting Rulemaking and Investigation on the Commission's Own Motion Into Competition for Local Exchange Service*, R.95-04-043, I.95-04-044, Decision 95-12-056, at Appendix C, 14 (released December 20, 1995) ("*CPUC Interim Interconnection Order*").

50/ *See CPUC Interim Interconnection Order*, at 21.

51/ *See Washington UTC Order*, at 46.

52/ *See* 47 U.S.C. § 251(b)(5), TCA, § 101 (emphasis added).

Because the TCA also permits bill-and-keep as a form of reciprocal compensation,[53] the TCA supports a conclusion that, to the extent that bill-and-keep is adopted, it is applicable not only at the end office, but also at the tandem switch, and with respect to any transport provided by LECs to telecommunications carriers.

In sum, the Commission must correct the omission in the Notice by requiring that ILECs provide bill-and-keep at any point where CMRS providers interconnect to the ILEC network, whether it be the ILEC end office or the tandem switch. Any transport costs incurred by ILECs in providing interconnection to CMRS providers at any point other than the end office should be subject to bill-and-keep and "meet points" negotiated by the parties. Recovery of transport costs through separate transport charges, moreover, is at odds with the concept of bill-and-keep. Under a bill-and-keep policy, LECs and CMRS providers are responsible for recovery of their respective transport costs.

---

53/ 47 U.S.C. § 252(d)(2)(B).

### B. The Budget Act and the Telecommunications Act of 1996 Require the Establishment of a Uniform, Federal LEC-to-CMRS Interconnection Policy.

The Omnibus Budget Reconciliation Act of 1993 ("Budget Act") amended Sections 2(b) and 332 to vest the Commission with exclusive jurisdiction over CMRS providers. Having "federalized" all commercial mobile radio services, Congress brought them within the Commission's plenary interstate jurisdiction. The Commission, therefore, has authority to establish rates, terms and conditions for any and all interconnection provided by LECs to CMRS providers. Accordingly, the Commission has exclusive authority to establish a bill-and-keep mutual compensation policy and any procedures necessary to implement such a policy. The Telecommunications Act of 1996 ("TCA") does nothing to alter this outcome.

#### 1. The Commission Should Implement a Combination of Negotiated Agreements and Interconnection Tariff Proceedings to Implement Interim Bill-and-Keep Policies.

As the Notice acknowledges, Commission involvement in implementation of a bill-and-keep policy may be necessary "to counter possible abuses of market power."[54/] Whether contract negotiation or formal tariffing procedures are required will depend on the scope and availability of bill-and-keep under the rules the Commission ultimately adopts for LEC-to-CMRS interconnection.

With regard to those aspects of LEC-to-CMRS interconnection that the Commission may decide to subject to a bill-and-keep policy, such as call termination at the end office or tandem switch, the potential for ILEC abuse of market power would be mitigated. Under

---

54/ *See* Notice, at ¶¶ 88-9.

such a scenario, therefore, interconnection negotiations would be appropriate as they could develop bill-and-keep interconnection without threat of ILEC abuse of market power. The Commission must also apply nondiscrimination standards to any individually negotiated interconnection agreements to require ILECs to make the same terms and conditions available to other CMRS providers.[55/]

Because ILECs retain market power, however, Commission implementation of those aspects of LEC-to-CMRS interconnection that may not benefit from bill-and-keep pricing should be submitted to a formal tariff review process. If a separate rate charge is required for a particular aspect of interconnection, the advanced notice periods and cost support standards required by the Commission's tariffing processes for dominant carriers are necessary to safeguard against ILEC abuse of market power.

---

55/ If a LEC makes an interconnection arrangement configured to the particular needs of one CMRS provider, it must make the same interconnection arrangement available under the same rates, terms and conditions available to all other similarly situated CMRS providers. In the "Tariff 12" investigation proceeding, for example, the Commission found that the "integrated package" of voice and data services that AT&T purported to offer to General Electric ("GE") through its Tariff 12 were unlawful because the tariff provisions were "on their face effectively available to only one customer, namely, the customer whose individually negotiated contract with AT&T prompted" the filing. *See AT&T Communications; Revisions to Tariff F.C.C. No. 12.*, Memorandum Opinion and Order, 4 FCC Rcd 4932, 4938 (1989) ("*Tariff 12 Order*"). Acknowledging the unreasonably discriminatory nature of restricting a service to a single customer, the Commission held that any "like" integrated services packages (*i.e.* any services that, based on a customer perception, are functionally equivalent) offered on a Tariff 12-type basis would have to be extended on the same terms and conditions to all similarly situated customers. *See Tariff 12 Order*, 4 FCC Rcd at 4935, 4938-9 (citing *Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790, 795; *Sea-Land Service, Inc.*, 738 F.2d 1311 (D.C. Cir. 1984)).

### 2. The Budget Act Vested the Commission With Exclusive Jurisdiction Over CMRS Providers and the Rates, Terms and Conditions of LEC-to-CMRS Interconnection To Establish a Uniform, Federal Bill-and-Keep Interconnection Policy.

The Notice seeks comment on three alternative jurisdictional approaches with regard to establishing standards for LEC-to-CMRS interconnection: (i) adopt a federal interconnection policy framework that would govern only interstate LEC-to-CMRS interconnection traffic and serve as a model which states could voluntarily follow with respect to intrastate LEC-to-CMRS interconnection traffic; (ii) adopt a mandatory federal policy framework to govern interstate and intrastate LEC-to-CMRS interconnection traffic, allowing states "substantial latitude" to develop specific interconnection arrangements; or (iii) establish specific federal requirements for all interstate and intrastate LEC-to-CMRS interconnection arrangements.[56/] Comcast submits that only the third option will comply with the law and promote wireless competition. Both the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") and the Telecommunications Act of 1996 ("TCA") support this conclusion.

The Budget Act vests the Commission with exclusive jurisdiction to mandate LEC-to-CMRS interconnection rates and practices. The Budget Act's grant of authority to the Commission to regulate CMRS rates and practices does not, as a matter of law, hinge on any preemption analysis showing that the intrastate and interstate portions of a service are inseverable. The Budget Act's jurisdictional grant of sole authority over CMRS providers transformed the jurisdictional nature of LEC-to-CMRS interconnection into an entirely

---

56/ *See* Notice, at ¶¶ 108-110.

interstate service. Preemption is, therefore, unnecessary because the Budget Act eliminated any "intrastate" component of LEC-to-CMRS interconnection.

Because the Budget Act brought all commercial mobile radio services within the scope of the Commission's exclusive, interstate jurisdiction, any interconnection provided by LECs for the purpose of origination or termination of CMRS calls is also jurisdictionally interstate. In this regard, Comcast agrees with the Notice's suggestion that the Commission must also reconsider its finding in *Louisiana PSC Rate Regulation Order*. Finally, important public policy considerations mandate that the Commission establish a uniform, federal bill-and-keep interconnection policy.

#### a. The Budget Act Vests the Commission With Exclusive Jurisdiction To Mandate LEC-to-CMRS Interconnection Rates and Practices.

With the adoption of the Budget Act of 1993 and amendments to Sections 2(b) and 332 of the Communications Act, Congress vested the Commission with exclusive jurisdiction over CMRS service, and interconnection between LECs and CMRS providers. Establishing a uniform, federal bill-and-keep and LEC-to-CMRS interconnection policy is well within the purview of the Budget Act's grant of jurisdictional authority to the FCC.

The Communications Act contains a dual regulatory structure for interstate and intrastate wireline communications. Section 2(a) of the Act confers upon the Commission exclusive jurisdiction over "all interstate and foreign communication by wire or radio . . . ."[57/] Under this jurisdictional mandate, the Commission is empowered to regulate common carriers engaged in interstate communications. Section 2(b) limits Commission

---

57/ *See* 47 U.S.C. § 152(a).

jurisdiction "with respect to [] charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications . . . ."[58] Under *Louisiana PSC*, Section 2(b) "displaces" federal authority over intrastate matters, and the FCC may preempt only if the "interstate" and "intrastate" portions of the service are inseverable and the state regulation is inconsistent with an important federal policy.[59]

The basis of the Commission's jurisdiction over communications provided by mobile radio is different from its jurisdiction over landline communications. The Budget Act fundamentally realigned the balance of federal/state jurisdiction over CMRS. In the Budget Act, Congress amended Section 2(b) and Section 332 and reclassified all existing mobile services as either CMRS or private mobile radio services ("PMRS").[60] The Budget Act's amendments to Sections 332 and 2(b) of the Act vested the Commission with exclusive jurisdiction over CMRS.[61] In other words, these mobile services have been "federalized" by the Budget Act and are interstate services.[62]

---

58/ *See* 47 U.S.C. § 152(b).

59/ *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) ("*Louisiana PSC*"); *see also California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986); *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 880 F.2d 422 (D.C. Cir. 1989).

60/ *See* 47 U.S.C. § 332(d).

61/ *See* 47 U.S.C. § 332(c)(3). As discussed below, the Budget Act provides that states can petition the FCC for authority to reestablish substantive regulation over CMRS providers if they can demonstrate that CMRS has become a substitute for traditional landline telephone service for a substantial portion of the public within the state.

62/ Under Section 2(a), the Commission has comprehensive jurisdiction over interstate and foreign communications. *See Operator Services Providers of America*, 6 FCC Rcd 4475, 4476 n.17 (1991) ("*Operator Services of America*") (quoting *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1501 (D.C. Cir. 1984) (interstate and foreign

The Budget Act implemented a conforming amendment that, "[e]xcept as provided in . . . Section 332 . . . ", states retain regulatory authority over intrastate matters under Section 2(b).[63/] This amendment means that, with regard to matters under Section 332, Congress eliminated the jurisdictional "fence" under *Louisiana PSC*'s interpretation of Section 2(b) that would otherwise oust the FCC from jurisdiction over intrastate matters. Accordingly, the necessity to apply the two-pronged test for preemption under *Louisiana PSC* — *i.e.* whether the intrastate and interstate portions of a matter to be regulated are inseverable, and whether the state regulation substantially frustrates an important federal policy — no longer applies to matters under Section 332 because the Budget Act's amendment takes all substantive regulatory matters thereunder outside of state authority which arises pursuant to Section 2(b).

Given the elimination of state authority under Section 2(b), one may ask what effect the Budget Act has on authority over LEC-to-CMRS interconnection. The amendment to

---

communications are "totally entrusted to the FCC"); *Telerent Leasing Corp. et al.*, 45 F.C.C.2d 204, 217 (1974) (the Commission has "plenary and comprehensive regulatory jurisdiction over interstate and foreign communications"), *aff'd sub nom., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976)). The FCC's jurisdiction over interstate and foreign communications is distinct from state authority, "Congress having deprived the states of authority to regulate the rates or other terms and conditions under which interstate communications services may be offered." *See Operator Services of America*, 6 FCC Rcd at 4477 nn.18-19 (citing *AT&T and the Associated Bell System Cos.; Interconnection With Specialized Carriers in Furnishing Interstate and Foreign Exchange Service in Common Control Switching Arrangements*, 56 F.C.C.2d 14, 20 (1975) ("The States do not have jurisdiction over interstate communications"), *aff'd sub nom., California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *AT&T v. Pub Serv. Comm'n*, 635 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate communications is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC")).

63/ *See* 47 U.S.C. § 152(b).

Section 2(b) directs the reader to look to Section 332 for the answer. Identifying exactly how the FCC's jurisdiction over CMRS was changed by the Budget Act requires analysis of the statute and its underlying policies. Based on such an analysis, the only reasonable conclusion is that Congress expanded the FCC's jurisdiction over CMRS providers and interconnection to CMRS providers in the Budget Act.[64/]

The Budget Act shows that Congress delegated jurisdictional authority to the FCC with regard not only to CMRS providers but also any interconnection that CMRS providers require of any common carriers, regardless of any physically intrastate facilities or the intrastate nature of any traffic involved, and irrespective of a preemption analysis. Section 332(c)(1)(B) provides that:

> Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

The plain meaning of the first sentence of this provision is that the FCC has authority to order *all* common carriers to establish physical interconnection with CMRS providers,

---

64/ To conclude that Congress intended to reduce or maintain the status quo of the FCC's authority over CMRS interconnection is contradicted by the legislative history. In particular, Congress stated with respect to Section 332(c)(1)(B), that it "considers the right to interconnect an important one and one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network." *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 261 (1993) ("House Report").

upon request, and pursuant to Section 201 of the Act.[65/] The second sentence of Section 332(c)(1)(B) means that the Commission's authority to order interconnection is not altered, *except when the Commission acts in response to a CMRS provider's request for interconnection.* Accordingly, it necessarily follows that Commission's jurisdictional authority *is* altered with respect to requests from CMRS providers for interconnection.

Comparing the terms of Sections 201 and 332(c)(1)(B), moreover, it is evident that Section 332(c)(1)(B) expands rather than limits the FCC's jurisdiction over CMRS. Section 201(a) provides:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, . . . in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical interconnections with other carriers[] . . . .[66/]

While the duty to provide interconnection under Section 201(a) extends only to those common carriers "engaged in interstate or foreign communication," Section 332(c)(1)(B) makes no distinction between interstate and intrastate common carriers, but rather, provides that "the Commission shall order *a common carrier* to establish physical connections" with CMRS providers. Furthermore, while Section 201(a) requires interstate and foreign common carriers to establish physical interconnections only with respect to "other carriers", Section 332(c)(1)(B) specifically identifies "any person providing

---

65/ Section 201 of the Act authorizes the Commission to order common carriers to provide service and to make physical interconnection available, upon request. 47 U.S.C. § 201(a).

66/ 47 U.S.C. § 201(a).

commercial mobile service" as being within the ambit of the statute's interconnection privileges.

Congress's amendments to Sections 2(b) and 332 expand the FCC's jurisdiction with regard to CMRS providers. Section 332(c)(1)(B) authorizes the FCC to order any common carrier, regardless of whether it is an intrastate or interstate carrier, to establish physical connections with any CMRS provider. The Budget Act also established that all commercial mobile radio services are interstate in nature and, therefore, within the FCC's exclusive jurisdiction.[67/]

The Telecommunications Act of 1996 ("TCA") preserves the Budget Act's expansion of the FCC's jurisdiction with regard to CMRS providers. Section 253 of the TCA authorizes the FCC to preempt state regulations that impose barriers to entry by telecommunications carriers.[68/] Section 253(e) provides, however, that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."[69/] Section 332(c)(3) preempts state rate and entry authority over CMRS and PMRS providers. Section 332(c)(3) also provides the states with an opportunity to petition for rate regulation authority. The Commission has sole authority over CMRS, unless and

---

67/ The legislative history states, for example, that Section 332 is designed to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." House Report, at 260.

68/ *See* 47 U.S.C. § 253.

69/ 47 U.S.C. § 253(e), TCA, § 101. This clause makes plain that Congress believed it had already removed state entry barriers for CMRS providers.

until a state files a petition for rate regulation authority and the Commission approves it.[70/] Accordingly, Section 253(e) provides that the Commission's exclusive authority over CMRS interconnection and state petitions to regain authority to regulate CMRS is unaffected by the TCA.

In sum, the Budget Act established that all commercial mobile radio services are jurisdictionally interstate. Because the Commission has exclusive jurisdiction over interstate services under Section 2(a) of the Act, the Budget Act vests the Commission with exclusive jurisdiction to establish a mandatory interim bill-and-keep policy for all interconnection involving CMRS providers. Nothing in the TCA changes this conclusion.

### b. The FCC Has Jurisdictional Authority To Regulate Formerly Intrastate LEC-to-CMRS Interconnection Rates, Terms and Conditions.

The Notice seeks comment on the "inseverability of interconnection rate regulation" as a justification for the Commission to establish a uniform, federal bill-and-keep framework for LEC-to-CMRS interconnection.[71/] According to the Notice's analysis, if the intrastate and interstate components of LEC-to-CMRS interconnection are "severable", the

---

70/ 47 U.S.C. § 332(c)(3)(A). The Commission also has sole discretion to "grant or deny" any state petition for authority to regulate the rates of CMRS providers. These provisions grant the Commission exclusive authority to decide whether a state has sufficiently proven either that market conditions with respect to CMRS fail to protect intrastate CMRS subscribers from discriminatory or unjust and unreasonable rates or that such non-competitive market conditions exist and CMRS is a "replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within [a] State." 47 U.S.C. § 332(c)(3).

71/ Notice, at ¶ 112.

Commission cannot legally preempt state regulation of LEC interconnection provided to CMRS providers.[72] The Budget Act, however, forbids the use of an inseverability analysis.

FCC jurisdiction depends not on the physical location of a communications facilities but on the nature of the communications.[73] Because commercial mobile radio services are jurisdictionally interstate, therefore, any LEC facilities and services, although physically intrastate, are jurisdictionally interstate to the extent that they are employed in the origination or termination of CMRS calls. Furthermore, the Budget Act, its underlying policies regarding competitiveness of CMRS services, and existing case law give the Commission authority to establish a uniform federal bill-and-keep interconnection policy to govern costs and charges regarding intrastate LEC traffic.

In the 1984 *NARUC v. FCC* decision, for example, the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") held that the Commission had authority under the Communications Act to prohibit restrictions on resale of *intrastate* WATS services used to complete interstate communications.[74] Rejecting NARUC's argument that the

---

72/ *See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, at n.28 (1987) ("*1987 Cellular Interconnection Declaratory Ruling*").

73/ *See United States v. American Tel. & Tel.* Co., 57 F. Supp. 451 (S.D.N.Y. 1944), *aff'd per curiam*, *Hotel Astor v. U.S.*, 325 U.S. 837 (1945). The U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") has held that "[t]he key to [FCC] jurisdiction is the nature of the communication itself rather than the physical location of the technology." *See New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (D.C. Cir. 1980) ("*New York Telephone*") (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-9, 88 S.Ct. 1994, 2000-2001 (1968); *General Tel. Co. v. FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888, 90 S.Ct. 173 (1969)).

74/ *See National Ass'n of Reg. Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498-9 (D.C. Cir. 1984) ("*NARUC v. FCC*").

Commission lacked jurisdiction to order unrestricted resale and sharing of intrastate WATS lines, the Court of Appeals stated that the "dividing line between the regulatory jurisdictions of the [Commission] and the states depends on the 'nature of the communications which pass through the facilities [and not on] the physical location of the lines.'"75/ Just as the *NARUC v. FCC* court found that "the physically intrastate location of [a] service does not preclude [Commission] jurisdiction so long as the service is used for the completion of interstate communications", the physically intrastate location of LEC facilities and services used in the origination or termination of CMRS calls does not preclude Commission jurisdiction over the rates and practices regarding use of those facilities and services in the completion of interstate CMRS calls.76/

The *NARUC v. FCC* line of cases is controlling on the issue of jurisdiction over physically intrastate facilities used to provide interstate services. Similarly, in the MTS/WATS proceeding, the Commission restructured the pre-divestiture Bell System's then-existing exchange network facilities information access ("ENFIA") tariffs and carrier origination and access tariffs ("COATs") to prescribe interstate access rates that the Bell System would charge interexchange carriers, and specialized common carriers, for access to the Bell System's local exchange networks.

---

75/ *See NARUC v. FCC*, 746 F.2d at 1498 (quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1010 (1978); *National Ass'n of Reg. Util. Comm'rs v. FCC*, 738 F.2d 1095, 1114-5 (D.C. Cir. 1984); *Computer & Communications Industry Ass'n v. FCC* , 693 F.2d 198, 214-218 (D.C. Cir. 1982), *cert. denied* 491 U.S. 938 (1983)).

76/ 746 F.2d at 1492.

Over the objection of some state public utilities commissions ("PUCs") arguing that the Commission could not prescribe access charges because such action would intrude upon the jurisdiction of the states, the Commission stated in the *MTS/WATS Third Report and Order* that the PUCs misconceived "the nature of jurisdiction to regulate interstate commerce."[77/] The Commission held that:

> [a]ny action of this Commission that establishes or prescribes charges for the origination and termination of interstate services cannot appropriately be described as a 'preemption' of state regulation because such charges are appropriately within the federal jurisdiction, not state jurisdiction . . . . The origination or termination of an interstate communication, *including the use of a local loop between an end user's home or office and a local switch of a local exchange carrier*, is necessarily a part of interstate communication.[78/]

Because the Budget Act established all commercial mobile radio services as interstate in nature, any action by the FCC to establish or prescribe charges with regard to origination or termination of CMRS calls on the LEC network, including the use of a local loop between an end user's home or office and a local or tandem switch of a LEC, is fully subject to FCC authority. Thus, as the Court of Appeals stated in affirming the *MTS/WATS Third Report and Order*, the LEC facilities used to originate or terminate CMRS calls here "have been placed in the interstate jurisdiction."[79/]

---

77/ *See MTS and WATS Market Structure*, Third Report and Order, Phase I, CC Docket No. 78-72, 93 F.C.C.2d 241, 260 (1983) ("*MTS/WATS Third Report and Order*"), *aff'd sub nom., National Ass'n of Reg. Util. Comm'rs v. FCC*, 737 F.2d 1096 (D.C. Cir. 1984).

78/ *See id.* (emphasis added).

79/ 737 F.2d at 1114.

Just as the origination or termination of interexchange carrier traffic on the local loop between the end user and the LEC end office led the Commission to conclude access charges are jurisdictionally interstate in nature in the *MTS/WATS Third Report and Order*, the origination and termination of CMRS traffic under the Budget Act is jurisdictionally interstate in nature, and so therefore are the local loop, LEC tandem or end office switching. Thus, LEC rates and practices for interconnection made available to CMRS providers, although physically intrastate, are jurisdictionally interstate in nature and, thereby, subject to the Commission's exclusive jurisdiction.[80/]

### c. The Commission Must Reverse its Finding in the *Louisiana PSC Rate Regulation Order* That the Budget Act Does Not Give the Commission Jurisdiction Over Rates and Practices Concerning Intrastate LEC-to-CMRS Interconnection Traffic.

The Commission seeks comment on whether it must reconsider its finding in the *Louisiana PSC Rate Regulation Order* that Section 332 does not give the Commission jurisdiction over intrastate LEC rates and practices with regard to interconnection provided to CMRS providers.[81/] The Budget Act and existing precedent contradict the *Louisiana PSC Rate Regulation Order*'s finding. Comcast therefore urges the Commission to reverse the *Louisiana PSC Rate Regulation Order* to the extent that it conflicts with the

---

80/ *Accord Amendment of the Commission's Rules To Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, WT Docket No. 96-6, FCC 96-17 (released January 25, 1996) ("*Fixed Wireless Local Loops Notice*").

81/ *See Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana*, 10 FCC Rcd 7898, 7908 (1995) ("*Louisiana PSC Rate Regulation Order*"). *See* Notice, at ¶ 112.

Commission's jurisdiction under the Budget Act over rates and practices regarding LEC-to-CMRS interconnection, which as shown above is jurisdictionally interstate in nature.

The Commission erred in concluding in the *Louisiana PSC Rate Regulation Order* that the Budget Act's amendments to Section 332 preserve a state's jurisdiction over the interconnection rates charged by a LEC to a CMRS provider.[82/] Insofar as the Budget Act has reclassified all commercial mobile radio services as interstate, and therefore within the Commission's exclusive jurisdiction, the pre-Budget Act jurisdictionally dual regulatory framework for interconnection rates no longer exists as a legal matter. Accordingly, the initial rationale for finding that intrastate LEC rates charged to cellular licensees are severable because cellular licensees provide intrastate, local exchange service, has been mooted by the enactment of the Budget Act and the TCA.[83/] The Commission's earlier analysis is discussed below.

In the *1986 Cellular Interconnection Order*, the Commission issued a cellular-to-landline LEC interconnection policy.[84/] The Commission concluded that such

---

82/ *See Louisiana PSC Rate Regulation Order*, 10 FCC Rcd at 7908.

83/ A recent decision by the Connecticut Department of Public Utility Control ("Connecticut DPUC") highlights the potential roadblocks that state regulation may create for CMRS providers in the absence of a uniform federal bill-and-keep policy. The Connecticut DPUC has expressly prohibited LECs from providing mutual compensation to wireless carriers. *See DPUC Investigation Into Wireless Mutual Compensation Plans*. Docket No. 95-04-04, at 14-5 (Connecticut DPUC, released September 22, 1995) ("*Connecticut DPUC Wireless Mutual Compensation Order*").

84/ *See The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 Rad. Reg. 2d (P&F) 1275, 1283 (1986) ("*1986 Cellular Interconnection Order*").